IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 28TH SEPTEMBER 2007 / 6TH ASWINA 1929

SA.No. 866 of 1994()

AS.71/1991 of SUB COURT, PAYYANNUR
OS.152/1988 of MUNSIFF COURT, PAYYANNUR
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APPELLANT: APPELLANT/ PLAINTIFF

OMANIYAM CHETTOOR VADAKKE ILLATH GOVINDAN NAMBOODIRI, S/O. KESAVAN NAMBOODIRI, RESIDING AT CHERUTHAZHAM AMSOM DESOM.

BY ADV. SRI.O.RAMACHANDRAN NAMBIAR
SRI.DENY JOSEPH

RESPONDENT/ RESPONDENT/ DEFENDANT

PAZHASSIYIL MATHRADAN APPADA CHERIYA, RESIDING AT CHERUTHAZHAM AMSOM DESOM.

BY ADV. SRI.P.V.MOHANAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 28/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 866 OF 1994

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Dated this the 28th day of September, 2007

JUDGMENT

Plaintiff in O.S.152/1988 on the file of Munsiff Court, Payyannur is the appellant. Defendant is the respondent. Appellant instituted the suit seeking a decree for permanent prohibitory injunction. According to the appellant, plaint schedule property along with the other properties was obtained by him under Ext.A1 partition deed of 1973 and tak No.1 of item No.3 of plaint B schedule property is the plaint schedule property. On the southern side of plaint schedule property there is a thatched house belonging to appellant, where he permitted respondent to reside and she has no right or possession over the remaining property, except the right to reside in the house. It was contended that respondent filed O.A.9831/1976 before Land Tribunal claiming that she is a cultivating tenant of the plaint schedule property

which was allowed by the Land Tribunal without notice to the appellant. Appellant filed A.A.288/1986 before Appellate Authority (Land Reforms). It was allowed and the case was remanded to the Land Tribunal for fresh disposal. Thereafter Land Tribunal dismissed O.A. It was contended that hence appellant has no right over the plaint schedule property and respondent attempted to trespass into the property and therefore she is to be restrained by a permanent prohibitory injunction from trespassing into the property. Respondent in the written statement contended that she is a cultivating tenant of the plaint schedule property she is not in possession of the building as permitted by the appellant. As against the order of the Land Tribunal, an appeal is filed before the Appellate Authority and as appellant is not in possession he is not entitled to a decree for injunction.

2. Learned Munsiff on the evidence of PW1, DW1 and Exts.A1 to A11, C1 and C2 dismissed the suit holding that appellant did not establish his possession of the plaint schedule property. Appellant challenged the decree and judgment before Sub Court, Payyannur in A.S.71/1991. Learned Sub Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. The appeal was admitted formulating the following substantial questions of law.

1. When courts finds that plaintiff has not identified the plaint schedule property whether courts below should have appointed a Commission to identify the property with reference to Ext.A1 partition deed.

2. When the Land Tribunal, after enquiry, found that respondent is not a tenant and the appeal was also dismissed, whether appellant is not

entitled to a decree for injunction on the strength of his possession.

4. Learned counsel appearing for appellant and respondent were heard.

5. Learned counsel appearing for appellant and respondent submitted that as against the original order passed by the Land Tribunal after remand dismissing the application filed for purchase of jenm right by the respondent, respondent filed an appeal along with an application to condone the delay. That petition was dismissed. Consequently the appeal was also dismissed. Respondent challenged the order before this court in C.R.P.952/1992 and C.R.P.1411/1992 This court set aside the order of the Appellate Authority and remanded A.A.34/1990 for fresh disposal. It was also reported that A.A.34 of 1990 was allowed and the original order of the Land Tribunal was set aside and case was remanded back to the Land

Tribunal on 19.6.2001. Therefore on the basis that Land Tribunal dismissed the application filed by respondent, appellant is not entitled to get a decree for permanent injunction.

6. Being a suit for injunction, appellant is entitled to a decree for injunction, only on establishing the identity of the plaint schedule property as well as possession. Courts below on the evidence found that identity was not established. The argument of learned counsel appearing for appellant is that, in such a case an opportunity should have been granted to the appellant to take out a Commission to identify the plaint schedule property with reference to the boundaries in Ext.A1 partition deed. It was also argued that when respondent claims that she is a tenant and no purchase certificate was obtained, courts below should have granted the decree.

7.The learned Munsiff and learned Sub Judge on

appreciation of evidence found that appellant did not establish possession of the property. That factual finding arrived at by courts below on the evidence cannot be interfered in exercise of the powers of this court under section 100 of Code of Civil Procedure. Therefore appellant is not entitled to a decree for injunction. The appeal is dismissed. It is made clear that the dismissal of the appeal will not prevent appellant from instituting a suit on the strength of title.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A..NO.866 /94

JUDGMENT

28th SEPTEMBER,2007